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January 4, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

Re: MM Docket No. 92-259

Dear Ms. Searcy:

Transmitted herewith on behalf of the National Basketball Association and the National Hockey League are an original and nine copies of its "Comments" in the above referenced proceeding.

Should you have any questions, please contact the undersigned.

Sincerely yours,

Philip R. Hochberg
Counsel for
National Basketball Association
National Hockey League

Enclosures

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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Cable Television Consumer	)	MM DOCKET NO. 92-259
Protection and Competition	)	
Act of 1992	)	
	)	
Broadcast Signal Carriage Issues	)	

COMMENTS OF
NATIONAL BASKETBALL ASSOCIATION
AND
NATIONAL HOCKEY LEAGUE

COME NOW the National Basketball Association (hereinafter sometimes "NBA") and the National Hockey League (hereinafter sometimes "NHL") (collectively sometimes "the Leagues") and file these comments in response to the Commission's Notice of Proposed Rule Making, Mass Media Docket No. 92-259, dealing with broadcast signal carriage issues affected by the Cable Television Consumer Protection and Competition Act of 1992 (hereinafter "the Act").[1]

The National Basketball Association is composed of twenty-seven teams throughout the continental United States. With respect to the broadcast of NBA games, all but one NBA

[1]Pub. Law 102-385, 102 Stat. ____ (1992).

team have over-the-air television contracts.[2] Five of the teams -- Atlanta (WTBS), Chicago (WGN-TV), Dallas (KTVT), Denver (KWGN-TV), and New Jersey (WWOR-TV) -- have contracted for the broadcast of some of their games on superstations.[3] In addition, the NBA has a national broadcast contract with the NBC network calling for the broadcast of twenty-five games during the current 1992-93 regular season and approximately twenty-five more during the playoffs.

The National Hockey League has sixteen teams in the continental United States and eight in Canada, most of which have over-the-air television contracts and two of which -- Boston (WSBK-TV) and Los Angeles (KTLA-TV) -- are on superstations. In addition, the National Hockey League has announced a further expansion, adding teams in the 1993-94 seasons in Anaheim and Miami.[4]

As programmers in the television marketplace, the Leagues have a substantial interest in certain issues raised in this proceeding, including the appropriate definition of

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[2]The New York Knicks do not have an over-the-air contract. Three teams -- Atlanta, Golden State, and Minnesota -- are each televised by two broadcast stations.

[3]A superstation is defined, per Section 325(b)(2), under the definition in 17 U.S.C. §119(d) as:

> . . . [A] television broadcast station, other than a network station . . . that is secondarily transmitted by a satellite carrier.

[4]**Wall Street Journal**, December 11, 1992, at B1.

a "local" television market, the applicability of 47 C.F.R. §76.67 in the must-carry scheme, the limited scope of the exceptions to retransmission consent, and the need of a broadcast station to obtain permission from the copyright holders of its programming before it grants retransmission consent.

COMMENTS

A. Must-Carry

1. Definition of a Local Commercial Station (Paragraph 17 of the Rule Making).

The Leagues support the Commission's proposal to incorporate the Cable Act's definition of a local commercial station into its rules.

Under Section 614(h)(1) of the Act, any broadcast station located in the same "television market" as a cable system is considered "local" to that system.[5] However, if a station is considered "local" pursuant to Section 614(h)(1), but is also a distant signal under Section 111 of

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[5]The determining factor for "local" status, as the House Report notes, is the Arbitron ADI Market Index:

> The Committee recognizes that ADI lines establish the markets in which television [stations] buy programming and sell advertising . . . The Committee believes that ADI lines are the most widely accepted definition of a television market and more accurately delineate the area in which a station provides local service than any arbitrary mileage-base definition.

H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 97 (1992) (hereinafter "House Report").

the Copyright Act, that station may be included in the must-carry scheme only if such station agrees

> to indemnify the cable operator for any increased copyright liability resulting from carriage on the cable system.

Section 614(h)(1)(B)(ii).

The Leagues request that the Commission confirm that the payment of a cable system's incremental copyright fees by a distant signal that is not located in the same television market as the system cannot cause such distant signal to be considered a "local" station for must-carry purposes. Thus, for example, even if WTBS were willing to indemnify a New York cable system for its increased copyright liability resulting from carriage of WTBS, WTBS cannot be considered a "local" must-carry station to that New York system.[6]

2. Requests to Add Communities to or Delete Communities from a Television Market (Paragraph 19).

Although the Commission notes that it has the authority to add communities to or delete communities from a station's television market "following a written request," the Act is

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[6]The clarification sought by the Leagues is certainly consistent with the view expressed by the Commission that:

> Out-of-market retransmission of a commercial television station's signal will occur only pursuant to a retransmission consent agreement.

Rule Making at Paragraph 45.

silent as to who is entitled to make such a request for modification.

The Leagues submit that, for the following reasons, any interested party should be permitted to make such a request to the Commission, including the owners of copyrighted programs.

First, neither the Act nor its statutory history require -- or even remotely suggest -- that broadcast stations and/or cable operators be the only parties entitled to make such requests.

Second, limiting requests to stations and/or operators could cause harm to other interested parties. For example, if not afforded the opportunity to request a change in the make-up of television markets, copyright owners could be denied the ability to exercise control over the distribution of their works, thereby undermining the effects of various Commission rules, such as syndicated exclusivity.

Finally, allowing professional sports organizations to request that certain communities be added to or deleted from a designated market would enable a league to coordinate its marketing efforts in a particular geographic area where there may be a natural affinity with a team or performer that would merit altering a certain television market to better reflect market realities and to effectuate the purposes of the Act. Accordingly, even though some communities in the southern portion of New Jersey technically may

be located in the expansive New York ADI, it is essential that a sports team in Philadelphia -- which is less than 35 miles away -- be able to target these New Jersey communities in order to successfully serve and nurture its community fan base.

Moreover, the Act expressly recognizes sports programming as one indicia of localism. In new Section 614(h)(1)(C)(ii), Congress has instructed the Commission, in determining whether to include a television station in a particular market, to consider whether the station

> provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community . . . .

(Emphasis added.)

3. Conforming Must-Carry with Deletion Rules (Paragraph 23).

The Leagues appreciate the difficulty of reconciling those situations where a local broadcast station may be entitled to must-carry status and is simultaneously subject to deletion due to network nonduplication and syndicated exclusivity rules.

However, in seeking to reconcile the conflicting interests at stake in such a situation, the Commission must be mindful of the express language of new Section 614(b)(3)(B) which requires that the protections afforded to

sports programming by virtue of Section 76.67 are not to be affected by the new must-carry provisions:

> A cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited and other programming authorized to be substituted under Section 76.67 or Subpart F of Part 76 . . . or any successor regulations thereto.

Section 614(b)(3)(B).

The NHL seeks Commission recognition of a unique situation: In at least two markets -- Detroit and Buffalo -- Canadian stations without must-carry rights have been carried in the past. The Commission ought to note if must-carry stations may be deleted to satisfy Section 76.67 under Section 614(b)(3)(B), certainly signals which do not have must-carry rights are subject to deletion. Therefore, cable systems within 35 miles of Detroit and Buffalo may be required to delete Canadian signals of Detroit Red Wing and Buffalo Sabre home games carried on Canadian stations if Section 76.67 is applicable.

4. Definition of "Networks" (Paragraph 26).

With respect to the definition of the term "network" to be developed for purposes of applying the new must-carry provisions, the Leagues request that the Commission expressly exclude from the definition what are referred to in sports television as "regional networks" -- i.e.,

unaffiliated stations in a team's geographic region that carry that team's game broadcasts, but which duplicate no other programming.

B. Retransmission Consent

1. Scope of Rule Making Proceeding (Paragraph 43).

Under the explicit language of Section 325(b)(1) and its legislative history,[7] retransmission consent applies to all "broadcasting stations" and not just to "television stations." Requiring the Commission to conduct a rule making proceeding with respect to the application of the new retransmission consent provisions to television stations does not mean those provisions do not apply to radio stations. As a result, should the Commission deem it necessary, a rule making proceeding to deal with the application of retransmission consent to radio stations should be opened.

2. The Scope of Exceptions to Retransmission Consent (Paragraphs 46-47).

As the Commission recognizes in Paragraph 45 of the Rule Making, "out-of-market retransmission of a commercial television station's signal will occur only pursuant to a retransmission consent agreement." The only exceptions to this requirement are set forth in Section 325(b)(2), which

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[7]See S. Rep. No. 102-92, 102d Cong., 1st Sess. 83-84 (1991) (hereinafter "Senate Report"); Conference Report, H. Rept. 102-862, 102d Cong., 2d Sess. ___ (1992) (hereinafter "Conference Report").

states that the need to obtain retransmission consent from a station does not apply to:

> (A) retransmission of the signal of a noncommercial broadcasting station;
>
> (B) retransmission directly to a home satellite antenna of the signal of a broadcasting station that is not owned or operated by, or affiliated with, a broadcasting network, if such signal was retransmitted by a satellite carrier on May 1, 1991;
>
> (C) retransmission of the signal of a broadcasting station that is owned or operated by, or affiliated with, a broadcasting network directly to a home satellite antenna, if the household receiving the signal is an unserved household; or
>
> (D) retransmission by a cable operator or other multichannel video programming distributor of the signal of a superstation if such signal was obtained from a satellite carrier and the originating station was a superstation on May 1, 1991.

(Emphasis added.)

The Leagues submit that, for the following reasons, the Commission is required to construe each exception to the application of retransmission consent as narrowly as possible in order to effectuate the purpose of Section 325.

First, as a matter of statutory construction, the exceptions must be read as "grandfathering" from the application of transmission consent only certain broadcast

stations in very limited circumstances.[8] Subsections (B)-(D) of Section 325(b)(2) each establish two distinct requirements that must be satisfied in order for a station to qualify for an exception:

- Under subsection (B), the exception for retransmission of a broadcast station's signal to a home satellite antenna can be obtained only if (i) such station is not (i.e., not currently) owned by, or affiliated with, a network, and (ii) such signal was, on May 1, 1991, retransmitted by a satellite carrier to the home satellite antenna. Thus, a station that is not presently affiliated with a network would not qualify for this exception unless its signal had been retransmitted by satellite on May 1, 1991 to the home satellite antenna seeking carriage of the station.

- The exception under subsection (C) for retransmission of a broadcast station's signal to a home satellite antenna is available only if (i) such station is (i.e., currently) owned by, or affiliated with, a network, and (ii) the household receiving the signal is (i.e., currently) "unserved." As a result, retransmission consent need not be obtained for the reception by a home satellite antenna of a network affiliate's signal so long as the household receiving the signal is "unserved."

- Under subsection (D), the exception for retransmission of a superstation's signal by a cable operator or other multichannel video programming distributor is available only if, on May 1, 1991, (i) such signal was obtained by the operator or distributor seeking carriage of the superstation from a satellite carrier, and (ii) the originating station was a superstation. Accordingly, a cable system that currently receives the signal of a station that was a superstation on May 1, 1991 would be required to obtain retransmission consent from the

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[8]As a matter of statutory construction, exceptions to statutes are to be narrowly construed. See, e.g., Group Life & Health Insurance v. Royal Drug Co., 440 U.S. 205, 231 (1979); National Broiler Marketing Ass'n v. U.S., 436 U.S. 816, 827-28 (1978).

> superstation unless the system had received the superstation's signal from a satellite carrier on May 1, 1991.[9]

Moreover, the narrow interpretation of the exceptions to retransmission consent advocated by the Leagues is consistent with the view expressed by the Commission in Paragraph 47 of the Rule Making:

> out-of-market retransmissions of television signals that are delivered to a cable system or other multichannel distributor by other means, such as microwave, or whose satellite carriage began after May 1, 1991, are not exempt from retransmission consent requirements.[10]

Second, the narrow construction of the exceptions is dictated by the statutory history of Section 325. With respect to the subsection (D) exception, for example, the original Senate version of the Act -- S.12 -- required cable systems to obtain retransmission consent from all superstations.[11]

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[9]Had Congress intended in Subsection (D) to exempt present or future carriage of superstations from retransmission consent rather than exempting only carriage as of May 1, 1991, it would have used the same construction and wording found in subsection (B) instead of the specific language contained in subsection (D).

[10]Limiting the scope of an exception based on signal carriage as of a certain date is also consistent with prior positions adopted by the Commission and Copyright Office. See, e.g., the Commission's definition of "grandfathered" signals being those carried on March 31, 1972 (see former regulations at 47 C.F.R. §76.65); see also Letter, dated November 21, 1984, to Trans-Am Communications Co. from Dorothy Schrader, General Counsel, Copyright Office.

[11]As of December 31, 1994, all superstations would have been subjected to retransmission consent. See Senate Report at 83.

However, in an eleventh-hour amendment to S.12, the Senate voted not to require a cable operator or multichannel distributor to obtain the retransmission consent of specific superstations -- i.e., those that were actually carried by such operator or distributor on May 1, 1991.[12] This limited "grandfathering" was intended, and must be interpreted, to apply only to those certain superstations that qualify for the exception codified in Section 325(b)(2)(D). Accordingly, any station that either gained superstation status or was first distributed to an operator or distributor by satellite carrier after May 1, 1991 is not to be "grandfathered."

3. Applicability of Section 614 to Retransmission Consent (Paragraphs 55-56 and 61).

The Leagues urge the Commission to reconsider its tentative conclusion that Section 614(b)(3)(B), which requires cable operators to carry the complete program schedule of a "must-carry" station, does not apply to a station that is carried by virtue of a retransmission consent agreement.

Such an interpretation is not prescribed -- or even suggested -- by the Act or its legislative history. Moreover, this unfounded interpretation could undermine the fundamental purpose of Section 614 because it would enable a cable operator to satisfy its obligation under the must-

[12]138 Cong. Rec. S564-S565 (daily ed., January 29, 1992).

carry rules by putting together one composite, "cherry-picked" channel of stations that have consented to the retransmission of only a portion of the programming on their signals.

Accordingly, if the carriage of a retransmission consent station is to be counted for purposes of a cable system's must-carry obligation under Section 614, all of the provisions of Section 614, including those governing the manner in which cable systems should carry their must-carry station, should apply equally to any such retransmission consent station.

4. Program Exhibition Rights and Retransmission Consent (Paragraph 65).

The Leagues request that the Commission follow the explicit statutory direction set forth in Section 326(b)(6) not to construe the retransmission consent provisions as affecting existing or future license agreements between program suppliers and broadcast stations concerning, among other things, retransmission rights.

First, any interpretation that would ignore and render meaningless this express statutory instruction would violate the established rule of statutory construction that a statute must be interpreted to give meaning and effect to

every provision, and a construction that renders a clause meaningless should be avoided.[13]

Second, as the statutory language and legislative history of Section 325(b)(6) acknowledge, to enable copyright holders to maintain some control over the distribution of their works, and to effectuate the Commission's rules regarding syndicated exclusivity and network nonduplication, it is essential that copyright holders be allowed to negotiate agreements with broadcast stations expressly dealing with retransmission rights and that such agreements not be undermined by the authority granted to broadcasters under Section 325(1).

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[13]See, e.g., Garza v. Marine Transp. Lines, Inc., 861 F.2d 23, 27 (2d Cir. 1988) (where an interpretation would render one clause superfluous or meaningless, it should be avoided).

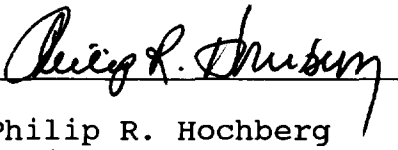
CONCLUSION

For the reasons stated herein, the National Basketball Association and the National Hockey League respectfully request adoption of these Comments.

Respectfully submitted,

NATIONAL BASKETBALL ASSOCIATION

NATIONAL HOCKEY LEAGUE

By 

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